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No. _____

In the

Supreme Court of the United States

October Term, 1994

UNITED STATES OF AMERICA,

Respondent,

v.

HAROLD W. GREENWOOD, JR.,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under the sixth amendment, a criminal defendant is entitled to a new trial based on an implied bias theory, in circumstances where a juror concealed during voir dire a connection to parties with a large financial stake in the defendant's conviction as well as other information that would have kept him off the jury, but then denied harboring bias against the defendant when his connection was uncovered at a post-trial hearing.

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The Order and Memorandum of the United States District Court for the District of Minnesota denying Petitioner's Motion for a New Trial for Juror Misconduct, dated December 31, 1991, is unreported and set forth in Appendix A. The opinion of the United States Court of Appeals for the Eighth Circuit affirming the district court's decision, number 92-1503MN, dated April 8, 1994, is reported at 22 F.3d 738 and is set forth in Appendix B. The Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc, dated May 20, 1994, is set forth in Appendix C.

JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to review the April 8, 1994, decision of the United States Court of Appeals for the Eighth Circuit in this matter. This Petition is timely under Supreme Court Rules 13.1 and 13.4, since it has been filed within 90 days of the May 20, 1994, denial of Greenwood's petition for rehearing.

CONSTITUTIONAL PROVISION

The following provision of the United States Constitution is involved in this case:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his

favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. vi.

STATEMENT OF THE CASE

On October 4, 1990, a superseding indictment was returned in the United States District Court for the District of Minnesota charging Petitioner Harold W. Greenwood with a series of financial and regulatory offenses. The prosecution arose out of the collapse of Midwest Federal Savings and Loan, where Greenwood had worked for over thirty years, including more than two decades as Chairman of the Board. In a closely related civil RICO action, Midwest Federal sued its former subsidiary, Green Tree Acceptance Corporation, alleging that Green Tree had defrauded Midwest Federal and contributed substantially to Midwest Federal's demise. Green Tree countersued. The civil action was scheduled to begin once the criminal action ended. District Judge Paul Magnuson, who presided over both actions, suggested during Greenwood's trial that Green Tree had a $600 million interest in Greenwood's conviction since the civil litigation could hinge on the outcome of the criminal case.

Because of this $600 million connection, Greenwood's counsel asked prospective jurors on voir dire if they "had regular contact with . . . Green Tree Acceptance Corporation." Prospective juror William Totten understood that the question asked whether he knew anybody at Green Tree. He responded that he did not know anyone at Green Tree and was permitted to sit on the jury.[1] Totten ultimately became jury foreman in Greenwood's case.

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[1] HOPEMAN: Now, to refer you to Question 37 in defense Exhibit 3. When you indicated that you did not know

Greenwood was convicted of nearly all counts on August 29, 1991. After the trial ended, counsel for Greenwood found out that in truth, jury foreman Totten had known Green Tree Vice President and Assistant General Counsel Drew Backstrand for six or seven years at the time of voir dire. Greenwood moved for an evidentiary hearing on juror misconduct, which the district court held on December 13, 1991.

At the evidentiary hearing, Green Tree Vice President Drew Backstrand admitted that he had known the jury foreman, William Totten, for many years before Greenwood's criminal trial, attended Totten's wedding, and had other social and business contacts with Totten and his family. The jury foreman also admitted that he had a friendly relationship with Backstrand. While admitting that he should have disclosed if he knew anyone working for Green Tree, jury foreman Totten claimed that he did not know Backstrand's employer at the time of voir dire.

Backstrand and Totten both claimed that they first learned of each other's roles in Greenwood's trial after recognizing each other in court during the testimony of Backstrand's boss at Green Tree, Rick Evans, who testified as a prosecution witness. But as the district court later acknowledged, their account did not square with the testimony of other witnesses such as Backstrand's boss at Green Tree and a paralegal who works for Backstrand.

Backstrand's boss, Green Tree General Counsel Rick Evans, admitted at the hearing that Backstrand informed him early on in Greenwood's six month criminal trial, well before Evans testified, that Backstrand knew someone on the jury. Evans announced Backstrand's connection to the jury foreman

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anybody at Green Tree, was your answer to that question true?

TOTTEN: Yes, it was true. (Hearing Transcript at 139.)

in secret communications with the group of lawyers allied against Greenwood in the civil case. As the trial judge noted, "[n]otwithstanding that the Green Tree lawyers are officers of the court, they failed to disclose any knowledge of Totten's relationship with Backstrand to this court." Memorandum and Order, December 31, 1991 at 5 (Appendix A). Evans conceded that he and other attorneys from the civil case also met with the jury foreman after Greenwood was convicted.

In addition to the Green Tree connection, the jury foreman did not disclose at voir dire his political affiliations in the face of explicit questions designed to elicit this information; concealed his personal connection to a political dispute between a community group and Harold Greenwood in his capacity as the head of the Metropolitan Airport Commission; and concealed his personal knowledge of a connection between his employer and a convicted felon linked to Greenwood's company. Indeed, Totten admitted that he "might have been concerned" during voir dire about being stricken from jury service in Greenwood's case depending on how he answered counsel's questions. Referring to the defendants, Totten also told another juror during trial (but before deliberations) that "I think we should hang 'em." Based on Totten's concealment of his connection to Green Tree, and his overall conduct at voir dire and afterward, Greenwood moved for a new trial.

The district court denied Greenwood's motion on December 31, 1991. The court reasoned that none of the jury foreman's undisclosed knowledge or connections to the case, standing alone, constituted "actual bias." Id. at 3-6. The court never suggested that the jury foreman honestly answered the questions at voir dire about his connection to Green Tree, his relevant political affiliations, or other outside knowledge and connections. Id. The district court did not credit the jury foreman's claim that he did not know Backstrand worked for Green Tree at the time of voir dire. Id. at 4-5. Rather, the

district court stated that it was disturbed by the evidence presented at the hearing. Id. at 4. The district court refused to grant a new trial solely because it felt there was insufficient evidence of "actual bias." Id. at 5.

The United States Court of Appeals for the Eighth Circuit, exercising its jurisdiction under 28 U.S.C. § 1291, affirmed the district court's decision in one sentence. United States v. Greenwood, 22 F. 3d 783, 785 (8th Cir. 1994) (Appendix B). The panel affirmed Greenwood's conviction on the single ground that the district court had correctly concluded that the jury foreman was not "actually biased." Id. In its published decision, the court did not set forth any of the facts underlying Greenwood's appeal. The Eighth Circuit denied Greenwood's petition for rehearing on May 20, 1994 (Appendix C). Greenwood has consistently argued to the district court and the Eighth Circuit the need for a new trial based on jury foreman Totten's implied bias in this case.

ARGUMENT

The Court should review the Eighth Circuit's decision that a criminal defendant must prove actual bias to obtain a new trial when a jury foreman deliberately conceals on voir dire a connection to parties with a profound financial stake in securing the defendant's conviction as well as other information that might have kept him off the jury. In such circumstances, bias should be presumed as a matter of law. However, the federal circuit courts conflict in determining whether a juror's implied bias requires a new trial. Some circuits, like the Eighth Circuit in this case, hold that a defendant is entitled to a new trial only when he can prove that a juror was actually biased. Other courts hold that implied bias is an alternative ground for a new trial. This Court's precedents give conflicting guidance. The Court's opinion in McDonough Power Equipment Co. v. Greenwood, 464 U.S.

548 (1984), provides inconsistent messages on whether a showing of implied bias can require a new trial. The apparent holding of McDonough also conflicts with the majority opinion in Smith v. Phillips, 455 U.S. 209 (1982), which seemingly condemns implied bias analysis in the context of certain juror misconduct.

I. THE COURT HAS NOT CLEARLY ANSWERED WHETHER IMPLIED BIAS IS AN APPROPRIATE BASIS FOR A NEW TRIAL UNDER THE TEST ESTABLISHED IN MCDONOUGH POWER EQUIPMENT CO. V. GREENWOOD, 464 U.S. 548 (1984).

In criminal cases, the accused has the right to "an impartial jury." U.S. Const. amend. vi. Voir dire provides the essential filtering process for excluding biased or otherwise unreliable members of the venire from sitting on the jury; it is the main procedural mechanism for assuring impartial juries. See, e.g., Harold v. Corwin, 846 F.2d 1148, 1154 (8th Cir. 1988) ("Voir dire was devised to insure to the fullest extent possible that only a fair and impartial jury will be selected.") However, voir dire relies on the honesty and good faith of prospective jurors in answering questions designed to uncover bias.

The issue in this case is whether a defendant seeking a new trial based on a juror's concealment of information at voir dire must show the juror's actual bias, or, alternatively, can rest on a showing of facts from which the juror's bias should be inferred as a matter of law. Actual bias is a subjective test requiring proof that the juror was, in fact, biased against the defendant so that the juror could not impartially weigh the evidence presented in the case. McDonough, 464 U.S. at 558 (Brennan, J., concurring) (defining actual bias as "'bias in fact'" (quoting United States v. Wood, 299 U.S. 123, 133 (1936)).

Implied bias is an objective test that determines, under the facts of a particular case, whether a reasonable person in the juror's situation would likely be impartial. Id.

The Court has not resolved the issue of whether a juror's implied bias can be a basis for a new trial. When a juror fails to provide requested information at voir dire, seven Justices agreed that the following test applies in determining whether a litigant's constitutional right to an impartial jury has been violated:

> [A] party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause.

McDonough, 464 U.S. at 556. The opinion of the Court further states that "[d]emonstrated bias in the responses to questions on voir dire may result in a juror being excused for cause. . . . " Id. at 554. Thus, according to the opinion of the Court, to meet the second part of the McDonough test, a party must show that a juror is demonstrably biased from the information that the juror would have given if he or she had responded honestly to the question posed. The plurality opinion does not discuss whether "demonstrated bias" means "actual bias" or "implied bias," or both.

Three Justices in McDonough wrote separately in a concurring opinion to set forth their interpretation of the rule. Justices Blackmun, Stevens and O'Connor contended that post-trial discovery of either actual or implied bias on the part of a juror warrants a new trial. Id. at 556-57 (Blackmun, J., concurring). Thus, according to the concurring opinion, the second part of the McDonough test requires a new trial when the incorrect response concerns a matter that alone would reveal a juror's bias against the party, or if the incorrect response concerns matters from which to presume such bias as

a matter of law. Under this conception of the McDonough test, implied bias analysis is appropriate in cases in which a juror provides incorrect information on voir dire.

Justices Brennan and Marshall in a separate concurring opinion agreed that implied bias could warrant a new trial, thereby giving implied bias analysis the clear imprimatur of a majority of the Court in McDonough. Justice Brennan wrote that "'the bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as a matter of law.'" Id. at 558 (Brennan, J., concurring) (quoting United States v. Wood, 299 U.S. 123 (1936)). Justice Brennan stressed the need to conduct the following two inquiries: "are there any facts in the case suggesting that bias should be conclusively presumed; and, if not, is it more probable than not that the juror was actually biased against the litigant." Id.

Each opinion in McDonough cited to Smith v. Phillips, which had been decided only two terms previously. The majority opinion in Smith, however, seemingly condemned implied bias analysis in the context of challenges for cause. 455 U.S. at 945 (refusing to adopt district court's imputation of juror bias in absence of evidence of actual bias). In Smith the Court repeatedly suggested that a defendant must prove actual bias, stating that "[t]his Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." Id. at 215.

Justice O'Connor concurred in Smith, but wrote separately to address the issue of implied bias analysis. Id. at 221 (O'Connor, J., concurring). Justice O'Connor explained that in certain situations, "proceedings resulting in a finding of 'no bias' are by definition inadequate to uncover the bias that the law conclusively presumes." Id. In particular, Justice O'Connor stressed that it may be impossible to prove actual bias, "partly because the juror may have an interest in

concealing his own bias and partly because the juror may be unaware of it." Id. at 221.

Similarly, Justices Marshall, Brennan and Stevens in dissent elaborated on the need for recognizing the implied bias doctrine. Id. at 224 (Marshall, J. dissenting). Noting the danger of unconscious bias and the possibility of misrepresentation by a juror accused of bias, Justice Marshall explained that requiring proof of actual bias is a virtually insurmountable standard in many cases. Id. at 228-32.

The opinions in McDonough and Smith thus yield no clear answer as to whether the implied bias doctrine is available for a criminal defendant seeking to prove a violation of his or her sixth amendment right to trial by an impartial jury. On the one hand, in McDonough, the concurring five Justice majority clearly expressed its approval of the implied bias doctrine. Both concurring opinions rely, however, on Justice O'Connor's concurring opinion embracing the implied bias doctrine in Smith. And the Smith majority opinion expressly states that actual bias is the appropriate standard. This inconsistency alone is a strong reason for the Court to revisit the implied bias issue.

II. THE CURRENT SPLIT AMONG THE CIRCUITS REGARDING THE PROPRIETY OF THE IMPLIED BIAS DOCTRINE WHEN A JUROR CONCEALS MATERIAL INFORMATION ON VOIR DIRE WARRANTS THE COURT'S REVIEW.

The inconsistency between the numerical majority in favor of the implied bias doctrine in McDonough and the apparent rule requiring actual bias in Smith has created a split among the circuits facing this issue. A majority of the circuits interpret McDonough's "challenge for cause" prong to require a new trial when a defendant demonstrates a juror's actual or implied bias. See, e.g., Amirault v. Fair, 968 F.2d 1404, 1406

(1st Cir.) (holding that juror's concealment of rape forty years previous to service on jury did not warrant finding of implied bias in rape prosecution) cert denied, 113 S.Ct. 602 (1992); United States v. Scott, 854 F.2d 697 (5th Cir. 1988) (presuming bias of jury foreman who concealed relationship to brother in law enforcement); Tinsley v. Borg, 895 F.2d 520, 526-29 (9th Cir.) (adopting implied bias rule but finding evidence insufficient in rape prosecution in which juror had previously counseled a rape victim suffering rape trauma) cert denied, 498 U.S. 1091 (1991); Burton v. Johnson, 948 F.2d 1150, 1156 (10th Cir.) (ordering new trial in homicide prosecution on the ground of implied bias because juror had deliberately concealed that she was abused as a child) cert denied, 113 S.Ct. 1879 (1993). But see id. at 1161 (Anderson, J. , dissenting) (defining implied bias as requiring proof that the juror had "such fixed opinions that she could not judge impartially").

A minority of circuits, however, reconcile McDonough and Smith by construing the second part of the McDonough test to require proof of actual bias, as is suggested in Smith. See United States v. North, 910 F.2d 843, 904 (D.C. Cir.) ("Under McDonough . . . a 'valid basis for challenge for cause,' . . . absent a showing of actual bias, is insufficient justification for a mistrial" (citations omitted)) cert denied., 500 U.S. 941 (1991); accord United States v. Brown, 977 F.2d 624, 634 (D.C. Cir. 1992). This seems to have been the approach of the Eighth Circuit in this case. United States v. Greenwood, 22 F.3d 783, 785 (8th Cir. 1994) ("The district court held an evidentiary hearing and properly denied the new trial motion after concluding the jury foreman was not actually biased.") But see Cannon v. Lockhart, 850 F.2d 437, 440 (8th Cir. 1988).[2]

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[2] We noted this issue in petition for rehearing.

Lastly, the Third and Sixth Circuits have expressly refused to decide whether the implied bias doctrine is valid. The Third Circuit, for example, has historically avoided the issue. United States v. Skelton, 893 F.2d 40, 45 (3d Cir.) (finding it unnecessary under facts of case to resolve "question of whether a court to grant a new trial must find that a juror was actually biased or whether bias can be implied from the circumstances established") cert denied, 498 U.S. 814 (1990); United States v. Salamone, 800 F.2d 1216, 1225 & n.11 (3d Cir.) (declining to make categorical rejection of "'implied bias' theory") cert denied, 493 U.S. 895 (9189) and cert granted and judgement vacated on other grounds by 493 U.S. 1038 (1990); United States v. Ferri, 778 F.2d 985 (3d Cir.) (refusing to decide whether Smith forecloses implied bias analysis) cert denied, 476 U.S. 1172 (1986). Most recently, the Third Circuit cryptically noted that its ruling on an actual bias issue did not foreclose a finding of implied bias and hinted that such a finding might be appropriate in certain cases. United States v. Calabrese, 942 F.2d 218, 224 & n.2, 226 (3d Cir. 1991). The Sixth Circuit also avoided deciding whether Smith foreclosed implied bias analysis in United States v. Howard, 752 F.2d 220, 223-24 (6th Cir.) (juror failed to respond on voir dire to question asking whether she had relatives or friends in law enforcement) cert denied, 472 U.S. 1029, and opinion vacated on new grounds by 770 F.2d 57 (6th Cir. 1985), and cert denied, 475 U.S. 1022 (1986).

The issue of implied bias on the part of jurors cuts to the core of the right to a fair trial. The current confusion among the circuits over the proper interpretation of McDonough renders the sixth amendment's guarantee of an "impartial jury" ambiguous and infirm, thus jeopardizing the rights of the accused. The Court should exercise its discretion to review the judgment of the Eighth Circuit in this case to define the proper standard for proving that a juror's dishonesty on voir dire violates the defendant's Sixth Amendment right to an

impartial jury in circumstances where the juror has concealed connections to interested parties or outside knowledge of the case.

III. THE EIGHTH CIRCUIT'S REFUSAL TO EMPLOY IMPLIED BIAS ANALYSIS IN THIS CASE DEPRIVED GREENWOOD OF A CONSTITUTIONAL REMEDY TO VINDICATE HIS RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY.

Greenwood demonstrated to the district court that the jury foreman in his case deliberately concealed a connection to an officer of Green Tree, a company that had an enormous financial interest in securing Greenwood's conviction. The district court itself suggested that, in its estimation, Green Tree had a $600 million interest in Greenwood's case. And referring to the defendants, jury foreman Totten told another juror during trial, before deliberations, that "I think we should hang 'em." Other evidence of bias is jury foreman Totten's admission that he "might" have been concerned about being struck from the jury when he fashioned his answers to questions on voir dire.

Based on these facts, Greenwood argued that jury foreman Totten's bias must be presumed as a matter of law from his concealment and subsequent misrepresentation of his connection to Green Tree, in the context of his overall conduct. The relationship to Green Tree would have been a basis for a challenge for cause because of Green Tree's enormous stake and eager participation in Greenwood's prosecution. The government's star witness on a number of the securities law issues was Rick Evans, Green Tree's General Counsel and Executive Vice President. Totten's connection at Green Tree, Drew Backstrand, actually attended trial the day when Evans was testifying and exchanged glances of recognition with Totten. Numerous exhibits relating to

Midwest Federal's business relationship with Green Tree were admitted at trial and the theory of Greenwood's defense hinged in part on the claims of his civil suit against Green Tree.

The district court and the Eighth Circuit, however, sidestepped the implied bias issue and denied Greenwood's requests for a new trial on the single ground of insufficient evidence that the jury foreman was actually biased. In fact, the district court did not bother to resolve the factual disputes surrounding Totten's conduct, such as Totten's claim that he did not know Backstrand worked for Green Tree at the time of voir dire; the court's rationale was that none of the matters which the jury foreman had concealed could alone warrant a finding of "actual bias."

This Court should grant certiorari to address and clarify the status of implied bias on the part of jurors as grounds for a new trial, in the context of the compelling facts here involving a juror's concealment of ominous outside connections to the case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: August 12, 1994

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

United States of America, CR. File No. 3-90-034

Plaintiff,

v. **MEMORANDUM AND ORDER**

Harold Wright Greenwood, Jr.,
Charlotte Elizabeth Masica,
Robert Arnold Mampel, and
Susan Greenwood Olson,

Defendants.

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INTRODUCTION

This matter is before the court on defendants' motion for a new trial based on juror misconduct. For the following reasons defendants' motion is DENIED.

BACKGROUND

Defendants allege that William Totten, a juror in the criminal trial of the named defendants, "breached his duties to make honest disclosures at voir dire and during trial." An evidentiary hearing with respect to Totten's alleged misconduct was held before this court on December 13, 1991. For purposes of this motion, defendants allege nondisclosure with respect to the following: St. Paul Airport Noise Coalition (SPANC), Political Organizations question on the "Juror Questionnaire", acquaintance with Green Tree lawyer, Drew Backstrand, knowledge of prosecution witness Ruth Shields, knowledge that Totten's employer, St. Paul Companies, had some connection with the trial. The court will address each separately.

DISCUSSION

The United States Supreme Court, in McDonough Power Equipment Inc. v. Greenwood, 464 U.S. 548, 556, 104 S.Ct. 845, (1984), set out the applicable standard for obtaining a new trial based upon a juror's failure to disclose information during voir dire. Under McDonough, it must first be shown

that the juror failed to answer honestly a material question on voir dire. Second, it must be shown that a correct response would have provided a valid basis for a challenge for cause. The McDonough test has been recognized by many of the circuits, including the Eighth Circuit.

The Eighth Circuit, in Cannon v. Lockhart, 850 F.2d 437, 440 (8th Cir. 1988) adopted the Supreme Court's harmless error test:

> We hold that to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial. Cannon v. Lockhart, at 440, citing McDonough, 104 S.Ct. at 850.

"'Whether an inaccurate answer was inadvertent or intentional, [is] simply [a] factor[] to be considered' in determining actual bias." Cannon v. Lockhart, at 440, citing McDonough, 464 U.S. at 558, 104 S.Ct. at 851 (Brennan, J., concurring). [A] juror's dishonesty is not a predicate to obtaining a new trial. The focus is on bias. Cannon, at 440.

1. St. Paul Airport Noise Coalition (SPANC)

The defendants assert that Totten was a supporter of the St. Paul Airport Noise Coalition (SPANC). The SPANC group vigorously opposed the Metropolitan Airports Commission of which defendant, Hal Greenwood was a

member, in an airport runway dispute. There is insufficient evidence of actual bias. There is no evidence that Totten was a member of SPANC. Additionally, significant evidence is lacking that Totten himself had any interest in the airport noise issue or took any particular position on it.

2. Political organizations Question on "Jury Questionnaire"

Defendants' allege that Totten failed to disclose his affiliation with the DFL political party during voir dire. The defendants point to question 14 of the "Juror Questionnaire":

"Organizations: Please list the name(s) of any organizations that you or your family belong to or support (please specify who is the member):

Political Groups:_____"

Totten left this space blank on his jury questionnaire.

First, the question regarding political groups in this instance would not have resulted in a cause strike. Whether or not William Totten supported DFL candidates in the past does not amount to actual bias. Second, the question is ambiguous. It is unclear whether the question asks of current memberships only or includes past associations. Furthermore, the record demonstrates that another prospective juror who had indicated an affiliation with the DFL was not stricken for cause.

3. Acquaintance with Green Tree lawyer Drew Backstrand

The most disturbing evidence presented at the hearing was testimony with respect to the Totten/Backstrand

relationship. At the hearing three witnesses, Rick Evans, Wanda Lamb-Lindow and Drew Backstrand, provided conflicting testimony regarding their knowledge of William Totten as a juror in the criminal trial. This occurred despite the fact that all three witnesses are employed by the same company, Green Tree Acceptance Corporation. According to Rick Evans' own testimony, which conflicts with Drew Backstrand's testimony, Evans had some knowledge of Totten before he went on the stand to testify, at the criminal trial. Further, Evans admitted to advising the civil lawyers in the related RTC v. Green Tree Acceptance Corporation, et al. litigation in July of 1991 of Totten's presence on the jury. It appears the civil lawyers "hid" behind the attorney/client privilege. Notwithstanding that the Green Tree civil lawyers are officers of the court, they failed to disclose any knowledge of Totten's relationship with Backstrand to this court. Three alternate jurors were available in the criminal trial to replace Totten if necessary. While the court is displeased with this circumstance, it does not rise to the level of bias that would warrant granting a new trial. There is insufficient evidence of actual bias.

Totten's relationship with Drew Backstrand is tenuous at best. It is true Totten had previously met Backstrand on two occasions in the past, a Christmas party and a wedding. Their contact was brief and without substance. The United States Supreme Court has stated that "[a litigant] is entitled to a fair trial but not a perfect one," for there are no perfect trials." McDonough Power Equip. Inc. v. Greenwood, at 553, 104 S.Ct. 848; Cannon v. Lockhart, at 439. Therefore, this court finds the relationship between Totten and Drew Backstrand, to the extent one exists at all, does not constitute actual bias.

4. Knowledge of prosecution witness Ruth Shields

Defendants contend that William Totten knew the prosecution witness, Ruth Shields. However, Totten testified at the hearing that he did not know Ruth Shields either before or during the trial. The court finds no indication of bias. Furthermore, Ruth Shields was a relatively minor witness in the criminal trial and therefore no further discussion is deemed necessary.

5. Knowledge that Totten's employer, St. Paul Companies, had connection with the trial

Defendants assert that Totten knew at the time of voir dire that his employer, the St. Paul Companies, did business with Green Tree Acceptance, a company which had a stake in the criminal trial. First, it is unclear whether Totten was aware that his employer did business with Green Tree. Second, if Totten had some knowledge of a business relationship with Green Tree and his employer, St. Paul Companies, there is no indication of actual bias with respect to the criminal trial on Totten's part. Furthermore, the defense counsel were well aware that Totten was employed by St. Paul Companies during voir dire as it was properly indicated in Totten's "Jury Questionnaire."

Accordingly, IT IS HEREBY ORDERED that defendants' motion for a new trial based on juror misconduct is DENIED.

Dated: December 31, 1991.

S/S

Paul A. Magnuson
United States District Court Judge

U.S. v. OLSON
Cite as 22 F.3d 783 (8th Cir. 1994)

UNITED STATES of America, Appellee,
v.
Susan Greenwood OLSON, Appellant.

UNITED STATES of America, Appellee,
v.
Robert Arnold MAMPEL, Appellant.

UNITED STATES of America, Appellee,
v.
Harold Wright GREENWOOD,
Jr., Appellant.

UNITED STATES of America, Appellee,
v.
Charlotte Elizabeth MASICA, Appellant.

UNITED STATES of America, Appellant,
v.
Susan Greenwood OLSON, Appellee.

UNITED STATES of America, Appellee,
v.
Robert Arnold MAMPEL, Appellee.

UNITED STATES of America, Appellant,
v.
Harold Wright GREENWOOD,
Jr., Appellee.

UNITED STATES of America, Appellant,

v.

Charlotte Elizabeth MASICA, Appellee.

Nos. 92-1500, 92-1501, 92-1503, 92-1505 and 92-1627 to 92-1630.

United States Court of Appeals, Eighth Circuit.

Submitted Nov. 8, 1993.

Decided April 8, 1994.

Rehearing Denied May 6, 1994 in No. 92-1501.

Rehearing and Suggestion for Rehearing En Banc Denied May 20, 1994 in No. 92-1503.

Rehearing Denied May 25, 1994 in No. 92-1500.

Former officers of failed savings and loan association were convicted by jury of various fraud counts, misapplication of bank funds, and racketeering, and the United States District Court for the District of Minnesota, Paul A. Magnuson, J., imposed sentences. Cross appeals were taken. The Court of Appeals held that: (1) evidence was sufficient to support convictions; (2) defendants waived objections to forfeiture of 100% of salaries and bonuses as proceeds of RICO activity; (3) calculating base offense level of defendants convicted of RICO conspiracy at less than 19 was error; (4) more than minimal planning increase to base offense level was required;

(5) sentencing guideline for abuse of positions of private trust applied; and (6) decreasing offense levels for minor participation was not clearly erroneous.

Affirmed in part, vacated in part, and remanded.

1. Criminal Law 369.2(3.1)

Evidence of failed savings and loan officer's extramarital affair with customer while officer was making questionable loans to customer was admissible in prosecution for fraud, racketeering, and misapplication of bank funds.

2. Indictment and Information 188

Indictment alleging scheme by former officers of failed savings and loan association to deprive United States of money or property permitted jury to convict former officers of wire fraud based on intangible loss.

3. Securities Regulation 199

Evidence of material misrepresentations by former officers of failed savings and loan association during private sale of subordinated debentures, primarily to bankers, was sufficient to support securities fraud conviction; one-on-one transactions with sophisticated buyers are not excepted from securities fraud law.

4. Forfeitures 5

Former officers of failed savings and loan association waived objection to forfeiture of 100% of salaries and bonuses, based on jury finding that compensation was proceeds of Racketeer Influenced Corrupt Organizations Act

activity, by acquiescing in jury instructions and verdict form that asked jury to decide whether each item of salary or bonus was forfeitable in its entirety. 18 U.S.C.A. § 1963(a)(1, 3).

5. Forfeitures 5

Complete forfeiture of salaries and bonuses paid to former officers of failed savings and loan association was supported by evidence that disputed compensation was proceeds of activity in violation of Racketeer Influenced and Corrupt Organizations Act and that amount of forfeitures was not disproportionate to gravity of offenses and amount of victims' losses. 18 U.S.C.A. § 1963(a)(1, 3); U.S.C.A. Const.Amend. 8.

6. Racketeer Influenced and Corrupt Organizations 98

Using base offense level of less than 19 for former officer of failed savings and loan association convicted of racketeering was error; base offense level for Racketeer Influenced and Corrupt Organizations Act offense is 19, even if offense level which applies to underlying racketeering activity is less. U.S.S.G. § 2E1.1(a), 18 U.S.C.A.App.; 18 U.S.C.A. § 1963(a)(1, 3).

7. Criminal Law 1251

Increase in offense level for more than minimal planning under guideline for fraud and deceit applied as matter of law to former officer of failed savings and loan association convicted of racketeering based on officer's multiple crimes, which were committed over a two-year period. U.S.S.G. §§ 2E1.1(a), 2F1.1, 18 U.S.C.A.App.; 18 U.S.C.A. § 1963(a)(1, 3).

8. Criminal Law 1254

Former savings and loan officer's position as vice president in charge of corpora lending was a "position of trust" mandating increased offense levels for various fraud an Racketeer Influenced and Corrupt Organizations Act convictions based on abuse of position of private trust. U.S.S.G. § 3B1.3, 18 U.S.C.A.App.; 18 U.S.C.A. § 1963(a)(1, 3).

See publication Words and Phrases for other judicial constructions and definitions.

9. Criminal Law 1254

Failure to increase offense levels for abusing positions of private trust by former officers of failed savings and loan association convicted of various fraud and Racketeer Influenced and Corrupt Organizations Act offenses was error, based on evidence that each defendant used positions significantly to facilitate commissions of crimes and conceal criminal activity. U.S.S.G. § 3B1.1, 18 U.S.C.A.App.; 18 U.S.C.A. § 1963(a)(1, 3).

10. Criminal Law 1251

Decreasing offense levels for minor participation in criminal activity when sentencing former officers of failed savings and loan association convicted of various fraud and racketeering acts was supported by evidence that president was major participant in criminal activity and that complaining defendants played lesser roles as president's soldiers. U.S.S.G. § 3B1.2(a, b), 18 U.S.C.A.App.; 18 U.S.C.A. § 1963(a)(1, 3).

Douglas Thomson of St. Paul, MN, argued (Douglas W. Thomson and Kate Latimer on the brief), for appellant Susan Greenwood Olson.

Earl Gray, St. Paul, MN, argued, for appellant Robert Arnold Mampel.

Jarett Decker, Minneapolis, MN, argued (William J. Mauzy and Jarett B. Decker on the brief), for appellant Harold Wright Greenwood, Jr.

Paul Engh, Minneapolis, MN, argued (Joseph S. Friedberg on the brief), for appellant Charlotte Elizabeth Masica.

Jon Hopeman, Minneapolis, MN, argued (Francis X. Hermann, Jon Hopeman, Christopher J. Bebel, Henry J. Shea, and Matthew C. O'Toole, on the brief), for appellee and cross-appellant.

Before FAGG and WOLLMAN, Circuit judges, and VIETOR,* District Judge.

PER CURIAM,

Following the 1989 collapse of Midwest Federal Savings and Loan Association (Midwest), the Government brought a forty-nine-count indictment against Midwest's president, Harold Wright Greenwood, Jr., and three other officers, Charlotte Elizabeth Masica, Robert Arnold Mampel, and Susan Greenwood Olson (collectively the appellants). The

*The Honorable Harold D. Vietor, United States District Judge for the Southern District of Iowa, sitting by designation.

indictment charged the appellants with conspiracy to defraud the United States, wire fraud, securities fraud, racketeering (RICO), misapplication of bank funds, and related crimes. After a complex six-month trial involving nearly nine thousand pages of testimony and hundreds of documentary exhibits, a jury convicted the appellants of most of the charges. The jury also found the appellants' 1988 and 1989 salaries and bonuses were proceeds of RICO criminal activity, and thus, subject to forfeiture. The district court sentenced the appellants and ordered the 1988 and 1989 salaries and bonuses forfeited. The appellants appeal their convictions and the district court's forfeiture order. The Government cross-appeals the sentences of Masica, Mampel, and Olson, but abandons its cross appeal of Greenwood's sentence. We affirm the convictions and forfeitures, but remand for resentencing of Masica, Mampel, and Olson.

[1] The appellants raise several claims of reversible error. Having carefully reviewed the record of this well-tried case, we reject the appellants' claims. An extended discussion would not serve any useful purpose because we can dispose of the, claims using clearly established rules. The district, court did not abuse its discretion in admitting evidence of Olson's, extramarital affair with a customer to whom she was making questionable loans, in denying the motions for severance of counts and defendants, or in, denying the mistrial motions. Nor did the district court abuse its discretion in denying the appellants', motion for. a new trial on the ground the jury foreman was biased. The district court held an evidentiary hearing and properly denied the new trial motion after concluding the jury foreman was not actually biased. *See Cannon v. Lockhart*, 850 F.2d 437, 440 (8th Cir.1988). We also conclude the district court properly instructed the jury.

[2, 3] The appellants also raise several contentions related to the sufficiency of the evidence supporting their convictions. We reject all of these contentions. First, viewing the evidence in the light most favorable to the jury verdict and construing all reasonable inferences in the Government's favor, *United States v. Nelson*, 988 F.2d 798, 802 (8th Cir.), *cert. denied*, — U.S. —, 114 S.Ct. 302, 126 L.Ed.2d 250 (1993), there was ample evidence for the jury to find beyond a reasonable doubt that the appellants committed each of the crimes. Second, the Government did not take inconsistent positions on the evidence, and the evidence presented at trial did not constructively amend the indictment. Third, because the indictment sufficiently alleged a scheme to deprive the United States of money or property, the jury did not improperly convict the appellants of wire fraud based on intangible loss. *See United States v. Granberry*, 908 F.2d 278, 280-81 (8th Cir.1990), *cert. denied*, 500 U.S. 921, 111 S.Ct. 2024, 114 L.Ed.2d 110 (1991). Fourth, the jury properly convicted appellants of securities fraud in the sale of subordinated debentures. The Government pleaded and the evidence clearly showed the appellants made material misrepresentations to the debenture buyers. Although the appellants privately sold the debentures primarily to bankers, one-on-one transactions with sophisticated buyers are not excepted from securities fraud law. *See Landreth Timber Co. v. Landreth*, 471 U.S. 681, 692, 105 S.Ct. 2297, 2305, 85 L.Ed.2d 692 (1985).

[4,5] Finally, the appellants contend the district court should not have forfeited 100% of the salaries and bonuses that the jury found were proceeds of RICO activity. *See* 18 U.S.C. § 1963(a)(1), (3) (1988). We disagree. Despite complaining in posttrial motions and on appeal that portions of the salaries and bonuses were earned through legal activity, the appellants failed to object to the jury instructions and the

verdict form that asked the jury to decide whether each item of salary or bonus was forfeitable in its entirety. Having acquiesced in the all-or-nothing instructions, the appellants waived any objection on appeal. *See United States v. Bruce*, 984 F.2d 928, 931 (8th Cir.), *cert. denied*, — U.S. —, 114 S.Ct. 275, 126 L.Ed.2d 226 (1993). Even if the appellants had preserved the issue, we would still affirm the forfeiture order because viewing the evidence in the light most favorable to the jury's forfeiture findings, *United States v. Wiley*, 997 F.2d 378, 384 (8th Cir.), *cert. denied*, — U.S. —, 114 S.Ct. 600, 126 L.Ed.2d 565 (1993), the evidence supports complete forfeiture of the salaries and bonuses. In addition, the amount of the forfeitures is not disproportionate to the gravity of the offenses and the amount of the victims' losses, and thus, the forfeitures do not violate the Eighth Amendment's Excessive Fines Clause. *Alexander v. United States*, — U.S. —, —, 113 S.Ct. 2766, 2775-76, 125 L.Ed.2d 441 (1993). We decline to address Greenwood's claim that his pension benefits are exempt from forfeiture because the issue is not properly before us.

Having considered all of the appellants' contentions we affirm the appellants' convictions and the district court's forfeiture order. We next turn to the Government's cross appeal under 18 U.S.C. § 3742(b), challenging Masica's, Mampel's, and Olson's sentences.

[6] The Government contends the district court misapplied U.S.S.G. § 2E1.1(a) (Nov. 1991) in calculating Olson's base offense level at 17 for her RICO conspiracy conviction. We agree. Section 2E1.1(a) provides that the base offense level for a RICO offense is 19, unless the offense level applicable to the underlying racketeering activity is greater. The district court calculated Olson's offense level for her underlying RICO crimes under § 2F1.1, the guideline for

fraud and deceit. After finding the amount of loss was greater than $800,000 and the offense did not involve minimal planning, the district court calculated Olson's offense level for underlying activity at 17. Because 19 is greater than 17, the district court committed error in failing to give Olson a base offense level of 19 under § 2E1.1(a).

[7] Even if the offense level for Olson's underlying RICO activity is applied under § 2F1.1, we believe Olson's base offense level should be 19. In our view, the district court's refusal to increase Olson's offense' level for more than minimal planning under § 2F1.1(b)(2)(A) is clearly erroneous. *See United States v. West*, 942 F.2d 528, 531 (8th Cir.1991). "Almost any crime that consists of a pattern of activity over a long period of time would qualify as an offense involving more than minimal planning." *Id.* Olson's multiple crimes,, committed over a two-year period, clearly warrant an increase to her offense level for more than minimal planning. Thus, whether § 2E1.1(a) or § 2F1.1 is applied, Olson's base offense level for her RICO conspiracy conviction is 19.

[8, 9] We also agree with the Government that the district court committed legal error in refusing to increase Masica's, Mampel's, and Olson's offense levels for abusing positions of private trust under U.S.S.G. § 3B1.3. Without specifying the basis for its holdings, the district court merely found an abuse of trust increase did not apply to the three appellants. An increase under § 3B1.3 is appropriate, however, if a defendant "(1) occupied a position of private trust and (2) used [the] position in a manner [that] significantly facilitated the commission or concealment of [the] offense." *United States v. Brelsford*, 982 F.2d 269, 271 (8th Cir.1992). In this case, Masica and Mampel concede they occupied positions of private trust at Midwest, and Olson's position as vice-president in charge of a corporate lending division was

similarly a position of trust for purposes of § 3B1.3. *See id.* at 271-72. Further, the record amply supports a finding that the three appellants used their positions significantly to facilitate the commissions of their crimes and to conceal their criminal activity. *See id.* at 272-73. Because our review of the record leaves us with "the definite and firm conviction that a mistake has been committed," we conclude the district court's findings that the appellants did not abuse positions of private trust are clearly erroneous. *United States v. Goebel*, 898 F.2d 675, 678 (8th Cir. 1990); *see United States v. McMillen*, 917 F.2d 773, 775-776 (3d Cir.1990).

[10]The Government also contends the district court committed error in decreasing Masica's and Mampel's offense levels for minor participation in the criminal activity under U.S.S.G. § 3B1.2(b) and in decreasing Olson's offense level for being a minimal participant under U.S.S.G. § 3B1.2(a). After presiding over the six-month trial, the district court found Greenwood was the major participant in the criminal activity and the remaining appellants played lesser roles as Greenwood's soldiers. We cannot say these findings are clearly erroneous. *See Goebel*, 898 F.2d at 677-78. Thus, the district court properly decreased the appellants' offense levels under § 3B1.2.

In sum, we affirm the convictions of Greenwood, Masica, Mampel, and Olson, and the district court's forfeiture order. We vacate the sentences of Masica, Mampel, and Olson, however, and remand the case to the resentencing consistent with this opinion.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 92-1503MNST

United States of America,	*	
	*	
Appellee,	*	
	*	Order Denying Petition
vs.	*	for Rehearing and
	*	Suggestion for Rehearing
Harold Wright Greenwood, Jr.,	*	En Banc
	*	
Appellant.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

May 20, 1994

Order Entered at the Direction of the Court:

s/Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit